

Supreme Court, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. **78-1610**

UNITED AIR LINES, INC.,

Petitioner,

vs.

LIANE BUIX McDONALD,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.**

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Petitioner United Air Lines, Inc. (herein "United") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on November 21, 1978, and amended by order of January 25, 1979.

OPINIONS BELOW.

The class order of the district court of March 1, 1978 is unreported and appears in the Appendix at A1-A2. The opinion of the Court of Appeals of November 21, 1978 is not yet reported and appears in the Appendix at A3-A10. The Order of the Court of Appeals of January 25, 1979, denying United's

petition for rehearing and amending the opinion of November 21, 1978, is not reported and appears in the Appendix at A11-A12.

JURISDICTION.

The opinion of the Court of Appeals was entered on November 21, 1978, and amended on January 25, 1979. Petition for rehearing and suggestion for rehearing in banc was denied on January 25, 1979. Jurisdiction is conferred on this Court by 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1.a. Whether the Court of Appeals erred in holding, contrary to the Third and Ninth Circuits, that in a class action under Title VII of the Civil Rights Act of 1964 the statute of limitations for putative class members is tolled by the filing of a charge with the EEOC by other than the named class plaintiff.

b. What event commences a class action under Title VII of the Civil Rights Act of 1964?

2. Whether the Court of Appeals erred in requiring the trial court, contrary to the premise of this Court's decision in *United Airlines v. McDonald*, 432 U. S. 385 (1977), to certify a class on remand which included a subclass not included in the original complaint, not requested of the trial court by the named plaintiffs, and with respect to which subclass the limitations period had long since expired under the tolling rule of *American Pipe & Construction Co. v. Utah*, 414 U. S. 538 (1974).

STATUTES INVOLVED.

The relevant portions of Section 706(d) and (e) of the original Title VII of the Civil Rights Act of 1964, 78 Stat. 260, are as follows:

Sec. 706(d) A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment

practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b) [filing charge with state agency], such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier

Sec. 706(e) If . . . the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge. . . .

The relevant portions of Section 706(e) and (f) of Title VII of the Civil Rights Act of 1964, as amended effective March 24, 1972, 42 U. S. C. § 2000e-5(e), (f), are as follows:

Sec. 706. (e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with the State or local agency with authority to grant or seek relief from such practice . . . such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier

Sec. 706. (f)(1) . . . If a charge filed with the Commission . . . is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action under this section . . . the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved. . . .

STATEMENT OF THE CASE.

Background.

This suit was brought as a class action in May 1970 in the northern district of Illinois, *sub nom. Romasanta v. United Air Lines*, under Title VII of the Civil Rights Act of 1964 on behalf of "approximately twenty-seven or twenty-eight" former United female flight attendants "who have been discharged on account of marriage" pursuant to United's no-marriage policy which had been in effect until November 1968. Comp. ¶ 3. The named plaintiff, Carole Romasanta, was a discharged flight attendant. Brenda Altman, another discharged flight attendant, was added as a named plaintiff in October 1970.

An earlier suit filed in 1968—*Sprogis v. United Air Lines*, 44 F. 2d 1194 (7th Cir. 1971), *cert. denied* 404 U. S. 991 (1971)—had held that United's no-marriage policy was a violation of the sex discrimination provisions of Title VII. *Sprogis* had been brought as an individual action. After liability was determined an effort was made to convert that suit into a class action and consolidate it with the then pending *Romasanta* suit.

The class requested in both *Sprogis* and *Romasanta* consisted of two subclasses:

- I. All flight attendants discharged pursuant to the no-marriage policy between July 2, 1965 and November 7, 1968;
- II. All flight attendants who resigned upon marriage between July 2, 1965 and November 7, 1968 and who complained against the no-marriage policy by filing grievances under the applicable collective bargaining agreement or by filing charges under Title VII or under other state or federal laws or regulations banning sex discrimination in employment.

The trial court refused to convert *Sprogis* into a class action and denied consolidation with *Romasanta*. In December 1972 the trial court in *Romasanta* accepted subclass II as requested, but held that subclass I should be limited to those former flight attendants who had been discharged and had protested the discharge. Class status was denied, however, on the grounds of lack of numerosity. Intervention was permitted to thirteen former flight attendants who met the class as thus defined. A petition for an interlocutory appeal by the named plaintiffs of the class status determination was denied by the Court of Appeals. The petition identified the asserted class as defined above.

After extensive discovery and negotiations the claims of the named plaintiffs and intervenors were settled and on October 6, 1975 the suit was dismissed with prejudice.

On October 21, 1975 respondent McDonald—a former United flight attendant who had been discharged upon her marriage in September, 1968 and who had not filed a charge with the EEOC—moved for leave to intervene for the purposes of appealing the order of December 1972 denying class status. The trial court denied the motion as untimely. The Court of Appeals reversed, holding the intervention to be timely and that it was error not to certify the class. The class suit was described by the Court of Appeals as one on behalf of "other United stewardesses who were similarly discharged." *Romasanta v. United Airlines*, 537 F. 2d 915, 917 (7th Cir. 1976).

United's petition for a writ of certiorari on the timeliness of intervention was granted, and in June 1977 a majority of this Court held that the intervention was timely and affirmed the Court of Appeals. *United Airlines v. McDonald*, 432 U. S. 385 (1977). The Court distinguished *American Pipe & Construction Co. v. Utah*, 414 U. S. 538 (1974)—United's primary authority¹—on the ground that there intervention after class status

1. *American Pipe* had held that the applicable statute of limitations, tolled upon commencement of the class action, started running again upon denial of class action status.

denial was for the purpose of pursuing the intervenor's individual interest, whereas here McDonald was intervening for the purpose of appealing class status denial.

With respect to the critical issue of prejudice to United which might result from the late entry of petitioner McDonald into the case, this Court observed (432 U. S. at 392-3)—

The lawsuit had been commenced by the timely filing of a complaint for classwide relief, providing United with "the essential information necessary to determine both the subject matter and size of the prospective litigation . . ." *American Pipe*, supra, at 555.

The class was described by this Court as "a class consisting of all United stewardesses discharged because of the no-marriage rule, whether or not they had formally protested the termination of their employment." 432 U. S. at 390.

Proceedings Following this Court's Decision.

Following this Court's decision, the case was remanded to the trial court. On remand, the district court certified the following class:

All women who were employed by defendant United Air Lines, Inc. as stewardesses or flight attendants and who, because of said defendant's no-marriage policy, were discharged between July 2, 1965 and November 7, 1968. (A2.)

Both petitioner United and respondent McDonald objected to the class order for different reasons. United claimed the class could not include those whose claims were time-barred at the time the class action was commenced, and that the earliest date for definition of the class had to be 90 days before the filing of a valid charge with the EEOC by the named plaintiffs.²

2. At the time this action was commenced, Title VII provided that a charge had to be filed with the EEOC within 90 days of the alleged discriminatory act. This requirement is jurisdictional. *Alexander v. Gardner-Denver Co.*, 415 U. S. 36, 47 (1974); *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 798 (1973); *United Air Lines v. Evans*, 431 U. S. 553 (1977).

Respondent McDonald objected because the class was limited to those who had been discharged by United and did not extend to those who resigned upon or in anticipation of marriage.

Permission for interlocutory appeals on each of the two issues was granted, and the two appeals were consolidated for briefing and oral argument in the Court of Appeals.

On appeal, respondent McDonald argued that the tolling event would be the first date of filing of an EEOC charge by any former United flight attendant raising the same issue, rather than the date of filing of the EEOC charge by the named plaintiff. Contrary to decisions of other courts of appeal which have considered the question, the Court of Appeals here agreed with respondent and concluded that the temporal limits of the class would be from October 27, 1965—90 days before the filing of charges by former flight attendants Whitmore and Van Horn³—to November 7, 1968, the date the no-marriage policy was withdrawn.⁴A8-9.

On the issue of scope of the class, the Court of Appeals concluded that the class "must include not only 'dischargees' but also 'resignees' on or before marriage . . ." A7. United contended that this extended the class beyond that which the original named plaintiffs had requested and the class which this Court assumed was before it in holding in *McDonald* that late intervention did not prejudice United. These arguments were dismissed by the Court of Appeals as "pettifogging about the prior pleadings." A6. Thus the class of "approximately twenty seven or twenty eight" claimed in the original complaint has been enlarged to a potential class of over 1,000 ten years after the no-marriage policy has been abandoned.

3. Whitmore and Van Horn had been discharged by United under the no-marriage rule. After the trial court denied class status each intervened individually, their claims were ultimately settled and the cause was dismissed with prejudice as to them in October 1975.

4. The Court of Appeals also stated that if discovery turned up an earlier charge, this would be the measuring event. It also suggested that a period longer than 90 days prior to the date of filing might be appropriate depending on whether the newly discovered charging party had also filed charges with a state agency. A9 n. 10.

United's petition for rehearing was denied by the Court below on January 25, 1979.

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals relating to the first question presented by this petition is in conflict with decisions of other courts of appeal. The decision below relating to the second question is inconsistent with decisions of this Court and includes as class members a subclass whose claims have long been time-barred. Both questions involve important issues of federal law in the administration of class actions under Title VII of the Civil Rights Act of 1964.

I.

In its prior decision in this case upholding the right of respondent McDonald to intervene, the Court found her to be "a member of that class against whom the statute had not run at the time the class action was commenced." *United Airlines v. McDonald*, 432 U. S. 385, 392 (1977).

The first issue raised here is the defining of the event which "commenced" the class action; for that event limits the temporal scope of the class to those against whom the statute had not yet run.

The Courts of Appeal for the Third and Ninth Circuits and many district courts have concluded, contrary to the decision of the Seventh Circuit in this case, that the tolling event is the filing of a timely charge with the Equal Employment Opportunity Commission ("EEOC"), alleging a violation of Title VII, by the person who subsequently files a timely complaint for class relief.⁵ Thus only those who could have filed a timely

5. There are two time limitations which are jurisdictional prerequisites to a lawsuit under Title VII. The first requirement is that a charge must be filed with the EEOC within 180 days of the alleged discriminatory act. Before the amendments to Title VII effective

(Footnote continued on next page.)

EEOC charge on or after the date the named plaintiff filed his or her charge are eligible to be in the class.

The Court below—contrary to the decisions of the other Courts of Appeal—held that the tolling event is the filing of an EEOC charge by *any* person, whether or not that person subsequently purports to act on behalf of the class. Thus in this case the Court below concluded that the temporal limits of the class would date from 90 days prior to January 26, 1966, the date on which two former United flight attendants filed EEOC charges protesting their discharge under the no-marriage rule.⁶ A9. Under the decisions of the Ninth and Third Circuits, the cut-off date would be 90 days prior to the date the named plaintiffs Romasanta and Altman filed their EEOC charges—either July 24, 1967 or May 16, 1968.⁷

(Footnotes continued from preceding page.)

March 24, 1972, this period was 90 days. If a State provides a vehicle for remedying the alleged discrimination, then the time for filing the charge is enlarged to 300 days, provided the charging party has filed a timely charge with the State agency. Before the 1972 amendments, this period was 210 days. The second jurisdictional prerequisite is that the lawsuit must be filed within 90 days of the charging party's receipt of a notice of right to sue issued by the EEOC. Before the 1972 amendments, this period was 30 days. See Statutes Involved, *supra*; *United Airlines v. McDonald*, 432 U. S. 385, 392 n. 11 (1977).

6. The two, Whitmore and Van Horn, intervened in this action in the district court upon denial of class status. They intervened on their own behalf to pursue their individual claims, as did the intervenors in *American Pipe*. Neither ever purported to act on behalf of a class.

7. United argued in the Court of Appeals that as between the two, the Altman charge was the proper tolling event. The original class plaintiff was Romasanta; United answered that she was not a proper party since she had settled and withdrawn her EEOC charge prior to filing the class suit. See *Kennan v. Pan American World Airways*, 17 FEP Cases 1445, 1447 (N. D. Cal. 1978): "a claim settled before the commencement of a Title VII class action" may not be "its jurisdictional basis." Altman, who had complied with the jurisdictional prerequisites to bringing a Title VII action, was added as a named class representative no doubt to forestall dismissal of the suit because of the infirmity in Romasanta's status. Because of its reliance on charges filed by other than the named plaintiffs, the Court below did not reach the question of whether the Romasanta charge could be the tolling event.

In *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 246 (3d Cir. 1975), cert. denied 421 U.S. 1011 (1975), the Court held:

A plaintiff may bring a class action on behalf of those who have not filed a charge with the EEOC. This tolls the statute of limitations for all members of the class. But *Wetzel* and *Ross* [the named class representatives] cannot represent those who could not have filed a charge with the EEOC at the time they filed their charges.

In *Inda v. United Air Lines*, 565 F.2d 554 (9th Cir. 1977), cert. denied 435 U.S. 1007 (1978), the same no-marriage policy involved in this case was challenged in another suit brought as a class action. The named plaintiffs there attempted to rely on the EEOC charges filed by the plaintiff in the earlier *Sprogis* suit and on the *Romasanta* charge in this case. In concluding that the then applicable 90 day statute of limitations was not tolled by charges filed by anyone other than the named plaintiffs, the court stated (565 F.2d at 559):

... [A]n employee, by filing an EEOC charge on his own behalf, is not acting on behalf of a class. As in the case of *Sprogis* (who sued only on her own behalf, *Sprogis v. United Air Lines*, 444 F.2d 1194 (7th Cir. 1971)), he may never act on behalf of a class. Until he does, so others cannot say that he has done for them that which is required of them by law.

The result is that timely filing of an EEOC charge is not a necessary condition to the obtaining of relief by one as a member of a class in whose behalf suit has been brought. However, if one brings suit on his own behalf, or as named plaintiff on behalf of a class, he must have secured a right to sue by timely following the procedures set forth in Title VII.

* * * * *

We conclude that the 90 day statute was not tolled by the filing of charges by others than *Inda* and *Moritz* [the named plaintiffs].

Numerous district courts have followed the same principle. In *Croker v. Boeing Company*, 437 F. Supp. 1138, 1178 (E. D. Pa. 1977), the court stated:

Title VII, as it existed when this action was filed, provided a 90 day limitation period for filing charges with the EEOC. Under Title VII, a plaintiff can bring a class action on behalf of persons who have not filed EEOC charges. Moreover, the filing of an EEOC charge tolls the statute of limitations for both the person who has filed the charge, and any class of persons he purports to represent. *On the other hand, a plaintiff's filing with the EEOC does not revive stale claims for which the 90 day time period has already expired at the time the plaintiff filed his charges.* In this action, the named plaintiffs can represent all persons who could have filed charges with the EEOC on June 19, 1968, the date plaintiff *Croker* filed her charge. All Title VII claims that did not accrue after March 23, 1968 (90 days prior to June 19, 1968) are barred by the statute of limitations. [Emphasis added.]

The district court in *Smith v. Union Oil*, 18 FEP Cases 1183 (N. D. Cal. 1978) finds the law to be "clear":

The law is now clear that a person is not a class member for back pay purposes unless he or she was the victim of employer discrimination within 300⁸ days prior to the filing of the named plaintiff's EEOC charge. See *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 9 FEP Cases 211 (3d Cir. 1975), cert. denied, 421 U.S. 1011, 10 FEP Cases 1056 (1975); *Harriss v. Pan American World Airways, Inc.*, 74 F.R.D. 24, 15 FEP Cases 1640 (N.D. Cal.

8. The difference between the 90 day statutory period described in *Inda* and *Croker* and the 300 day period in *Smith* arises out of the change in Title VII effected by the 1972 amendments to the 1964 Civil Rights Act, and the fact that a State remedy was available in *Smith* thereby enlarging the EEOC filing time. See *supra*, note 5. The appropriate limit in the instant case is 90 days, since the class action was filed in 1970 prior to the amendments, and at the time of filing the law of the states of domicile of the named plaintiffs provided no remedy for alleged sex discrimination.

1977); *Martinez v. Bechtel Corp.*, 10 E.P.D. 10,570, 11 FEP Cases 898 (N.D. Cal. 1975). On January 20, 1973, plaintiff filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging unlawful employment practices by the defendant. March 26, 1972, is 300 days prior to January 20, 1973. Accordingly, the opening date for identification of the class is changed from January 20, 1971, to March 26, 1972.⁹

The decision of the Seventh Circuit here is not only contrary to that of other circuits, but introduces a tolling test which is virtually unworkable. The ultimate fallacy, in our view, is that the decision looks to the charge filed by the named plaintiff as satisfying the jurisdictional prerequisites to filing the suit, and a different charge to "commence the class action." Thus the Whitmore and Van Horn charges, upon which the court relies,

9. Other district courts have reached the same conclusion. *Movement for Opportunity v. Detroit Diesel*, 18 FEP Cases 557, 562 (S.D. Ind. 1978); *Albers v. Hycel, Inc.*, 18 FEP Cases 867, 870-71 (S.D. Tex. 1978); *Hubbard v. Rubbermaid, Inc.*, 78 F.R.D. 631, 644 (D. Md. 1978); *Webb v. Westinghouse Electric Corp.*, 78 F.R.D. 645, 653 (E.D. Pa. 1978); *Terry v. South Central Bell Telephone Co.*, 16 FEP Cases 1539, 1540 (E.D. La. 1976); *Lamphere v. Brown University*, 71 F.R.D. 641, 648 (D.R.I. 1976) appeal dismissed, 553 F.2d 714 (1st Cir. 1977); *Harriss v. Pan American World Airways*, 74 F.R.D. 24, 41 (N.D. Cal. 1977); *Coppotelli v. Howlett*, 76 F.R.D. 20, 22 (E.D. Ill. 1977); *Smith v. General Motors Corp.*, 14 FEP Cases 987, 991 (E.D. Mich. 1977); *Mays v. Motorola, Inc.*, 14 FEP Cases 1470, 1473 (N.D. Ill. 1977); *Grogg v. General Motors Corp.*, 72 F.R.D. 523, 534 (S.D.N.Y. 1976); *Carter v. Newsday, Inc.*, 76 F.R.D. 9, 15 (E.D. N.Y. 1976); *Taylor v. Vocational Rehabilitation Center*, 13 FEP Cases 452, 456 (W.D. Pa. 1976); *Jones v. United Gas Improvement Corp.*, 68 F.R.D. 1, 16 (E.D. Pa. 1975); *Martinez v. Bechtel Corp.*, 11 FEP Cases 898, 906 (N.D. Cal. 1975); *Marshall v. Electric Hose & Rubber Co.*, 68 F.R.D. 287, 294 (D. Del. 1975); *Hecht v. CARE, Inc.*, 5 FEP Cases 352, 356 (S.D. N.Y. 1972).

Indeed, a different panel of the Seventh Circuit in an earlier decision upheld the employer's contention that employees "terminated more than 90 days prior to May 31, 1970, the date the original plaintiff class filed its charges with the EEOC" were excluded from the class. *In Re Consolidated Pretrial Proceedings in the Air Lines Cases*, 582 F.2d 1142, 1147 (7th Cir. 1978). Emphasis added.

could not have been the basis for a suit since neither received a right-to-sue letter from the EEOC—the second jurisdictional prerequisite to filing suit. Indeed, as of 1972 (two years after this suit was filed), the EEOC was attempting to locate Ms. Whitmore. Neither can sue in the future for each has settled her claim.

But the decision below goes beyond this: after concluding that on the record before it the class would date from October 27, 1965—90 days before the filing of the Whitmore and Van Horn EEOC charges—the court then qualified this in a footnote as being only the "most likely tolling date." A9, n. 10. If either the Whitmore or Van Horn charges filed with the EEOC in January 1966 were pending before the Commission in March 1972 when Title VII was amended to provide a 180 day filing period, then the "new 180-day limitations period would apply," stated the Court below. This would back the class date to July 29, 1965, 180 days prior to the January 25, 1966 filing date. Thus the decision below holds that the class would include not only those who could have filed charges when Whitmore and Van Horn filed in January 1966, but also those who could have filed at that time if the March 1972 Title VII amendments had been in effect in January 1966.

The issue of the retroactive application of the March 1972 amendments to Title VII was considered by this Court in *International Union of Electrical, Radio & Machine Workers v. Robbins & Myers*, 429 U.S. 229 (1976). There a charge had been filed with the EEOC 108 days after the alleged unlawful discharge, but within 180 days of the effective date of the March 1972 amendments, as of which date the charge had not been disposed of by the EEOC. This Court held (429 U.S. at 243):

... Congress intended the 180-day period to be applicable to charges such as that filed by Guy, where the charge was filed with the EEOC prior to March 24, 1972, [the effective date of the amending Act], and alleged a discriminatory occurrence within 180 days of the enactment of the Act. (Emphasis added.)

In a footnote to this holding, this Court stated that it need not decide whether the 180 day limitation period would be retroactively applied to charges filed between 90 and 180 days of the alleged occurrence "where the 180 days had run prior to March 24, 1972."

Here the Whitmore and Van Horn charges were not only charges filed by other than the named plaintiffs, but were filed six years before the March 1972 amending Act. The class suit itself had been filed two years prior to the 1972 Act. We suggest that serious constitutional issues would be presented were the Court of Appeals footnote to be followed.

The Court below did not stop here. In the same footnote (A9, n. 10), it stated that discovery "might turn up a prior EEOC charge, thus resulting in a different tolling date." The Court referred to a charge filed by another former United flight attendant, Helen Read Gunst, as a possible tolling event. To United's knowledge, Ms. Gunst never filed a charge with the EEOC, but only with the New York State Division of Human Rights. Her charge was settled in November, 1972 and the matter was closed (Case No. CS-12770-66, Appeal No. 1391). She sought to intervene in this case prior to the conclusion of her New York charge and intervention was denied by the trial court because of the pendency of her New York claim. She never sought review of that denial.

Under the Seventh Circuit rule, the class limits can be determined only after discovery. It invites pursuit of all charges, including those long settled and even perhaps those of which the employer has no knowledge. It raises potential dispute over the similarity of other charges. Problems of uncertainty of settlement are introduced since other charges might come to light after the class is defined and the case concluded. It places a construction on the March 1972 amending Act of dubious constitutionality.

Under the Third and Ninth Circuit rule, the basic temporal parameters of the class can be determined upon filing of the suit

by reference to the date the named plaintiff filed his or her EEOC charge.

We respectfully suggest that the tolling principle set forth by the Third and Ninth Circuits is the more rational approach to determining the temporal class limits.¹⁰ In any event, the confusion arising from the conflict¹¹ among the circuits should be resolved.

II.

Upon remand after this Court's decision, McDonald requested the trial court to include in the class former flight attendants who resigned because of the no-marriage policy, whether or not they had protested the policy. The trial court limited the class to those who had been discharged upon marriage. The Court of Appeals reversed on this point and held the class had to include resignees, thereby expanding the class beyond that requested by the named plaintiffs.

This expansion of the class by the court below, we submit, violates the fundamental principle that an intervenor takes the

10. The Romasanta, Altman, Van Horn and Whitmore charges were filed as individual, not class, charges with the EEOC. An alternative possibility is that the class action did not commence until someone purported to act on behalf of the class. See *Inda v. United Air Lines*, 565 F.2d 554, 559 (9th Cir. 1977), cert. denied 435 U.S. 1007 (1978). On that view, the class action did not commence until this suit was filed as a class action in May 1970. It was that event which gave United the "essential information necessary to determine both the subject matter and size of the prospective litigation." *United Airlines v. McDonald*, 432 U.S. 385, 392-3 (1977). Since United had terminated the no-marriage policy in November 1968, there could have been no persons other than the named plaintiffs who were not time-barred when the suit was commenced.

11. The conflict for a multi-state employer such as United is clear. Class action suits attacking the same employment practice—United's former no-marriage policy—are pending in this suit in the Seventh Circuit and in the *Inda* case, discussed above, in the Ninth Circuit. Each has now established a different tolling rule.

case as she finds it,¹² contradicts the assumption upon which this Court upheld the right of respondent to intervene, and is contrary to the tolling rule in *American Pipe & Construction Co. v. Utah*, 414 U. S. 538 (1974).

As noted in the Statement of the Case, the class proposed by the named plaintiffs included two subclasses:¹³

- I. flight attendants *discharged* pursuant to the no-marriage policy;
- II. flight attendants who *resigned* upon marriage and who *complained* against the no-marriage policy by filing grievances or charges under Title VII or other state or federal laws or executive orders barring sex discrimination in employment.

Thus, when the class was first proposed, the named plaintiffs distinguished between those discharged and those who resigned. They explained the reason for limiting the Subclass II to those who complained of the no-marriage policy on resignation:

The limitation of Class II plaintiffs to those who have protested the defendant's illegal policy by the filing of some type of grievance or charge gives further assurance that the persons included within the class resigned against

12. *General Insurance Co. of America v. Hercules Construction Co.*, 385 F. 2d 13, 18 (8th Cir. 1967) ("An intervenor accepts the pleadings as he finds them."); *Geisser v. United States*, 554 F. 2d 698, 705n6 (5th Cir. 1977) ("[A]n intervenor must accept the proceedings as he finds them."); *In re V. I. D. Inc.*, 177 F. 2d 234, 236 (7th Cir.) *cert. denied* 339 U. S. 904 (1949); *Philadelphia v. Morton Salt Co.*, 248 F. Supp. 506, 509 (E. D. Pa. 1965), (The greatest status intervenors may obtain is to "stand in the shoes of the party who brought the class suit on their behalf."). In some cases, intervention is conditioned or limited to certain issues, but in no event may the intervenor's rights be greater than the original parties. "It is sound to treat the intervenor as if he were an original party, but he should not have greater rights than do the original parties." 7A Wright and Miller, *Federal Practice and Procedure*: Civil, Ch. 5 § 1921 (1972).

13. The class is described in the Petition for Permission to Appeal filed by the named plaintiffs Romasanta and Altman from the 1972 order of the trial court denying class action status. The Petition is set out at pages 62-72 of the Appendix filed in this Court in *United Airlines v. McDonald*, No. 76-545.

their will because of defendant's policy rather than for any other reason.¹⁴

United accepted as valid members of the claimed class those described in Subclass II, *i.e.*, those who resigned and protested the no-marriage policy. This group was eventually permitted to intervene by the district court and their claims were settled before McDonald's intervention in October, 1975.

As we have noted, the complaint was filed on behalf of a class of flight attendants "who have been discharged on account of marriage . . . There are approximately twenty-seven or twenty-eight other such discharged stewardesses." Plaintiffs made clear that the term "discharged" was not intended to include all stewardesses who had resigned. Their counsel has confirmed, in a statement of record, that ". . . in both cases [*Sprogis* and *Romasanta*] we regarded those stewardesses who resigned as proper class members only if they protested, thereby showing that they resigned involuntarily."

Since the named plaintiffs never asked the trial court to include in the class those flight attendants who had resigned without protest, that issue could not have been the subject of an appeal whether prosecuted by the named plaintiffs or McDonald. The claims of all persons defined in Subclass II—those who resigned and protested—having been disposed of by the trial court, the only remaining class issue was Subclass I, those who had been discharged. In response to United's argument that the inclusion of resigned former flight attendants was never an issue and could not have been the subject of any appeal, the Court of Appeals simply observed that "pettifogging about the prior pleadings is not decisive anyway . . ."¹⁵

14. This explanation was contained in the Memorandum for Plaintiff on Scope of Class Entitled to Relief filed in *Sprogis*. This Memorandum was refiled in this case in support of Plaintiffs' Motion to Consolidate the *Sprogis* case and this case.

15. The Court of Appeals states in the text of its opinion that "even United told the district court that if it were appropriate to maintain the action as a class action, the 'only appropriate class

(Footnotes continued on next page.)

In *American Pipe & Construction Co. v. Utah*, 414 U. S. 538, 554 (1974), the Court enunciated the following class action tolling rule:

We are convinced that the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to *all asserted members of the class who would have been parties had the suit been permitted to continue as a class action*. [Emphasis added.]

If the trial court had certified the class initially sought by the named plaintiffs, it would not have included former flight attendants who had resigned without protest because they were never "asserted members of the class." The statute of limitations would not have been tolled respecting them, and their claims would have been time barred more than five years prior to the decision of the court below requiring their inclusion in the class, even assuming the named plaintiffs could have included them in the asserted class had they elected to do so.¹⁶

McDonald has recognized the principle that the intervenor takes the case as she finds it. In the prior case before this Court, she successfully argued that her intervention after final judgment in the trial court was simply for the purpose of permitting her to prosecute the appeal which the named plaintiffs could have but did not pursue.¹⁷

(Footnote continued from preceding page.)

would be all former stewardesses who resigned or were terminated because of defendant's no-marriage policy.'" A7-A8. In a footnote the Court noted the critical point that this concession was limited to those who protested. The Court failed to note that with respect to the subclass of resigned and protesting stewardesses, United was simply accepting what the original named plaintiffs had proposed. A7, n. 6.

16. The class representatives must possess the same interest and suffer the same injury as the class they purport to represent. *East Texas Motor Freight v. Rodriguez*, 431 U. S. 395, 403 (1977).

17. Resp. Br. in Opp. to Cert. Pet., 4-6; Resp. Br. 11, 14-15, 24 ("the intervenor seeks only to continue the original cause of action"), 26. In oral argument counsel for McDonald stated "The only difference about this case is that the appeal was prosecuted not by Romasanta but by McDonald." Tr. 42, No. 76-545.

It was this argument which apparently was critical to the majority of this Court in concluding that United would not be unduly prejudiced by the late entry of McDonald into the case:

United can hardly contend that its ability to litigate the issue was unfairly prejudiced simply because an appeal on behalf of putative class members was brought by one of their own, rather than by one of the original named plaintiffs. . . . United was put on notice by the filing of the *Romasanta* complaint of the possibility of classwide liability, and there is no reason why Mrs. McDonald's pursuit of that claim should not be considered timely under the circumstances here presented. 432 U. S. at 394-5.

The decision below undercuts the premise upon which this Court found that United would not be prejudiced by Ms. McDonald's entry into this case five years after it started. The filing of the *Romasanta* complaint did not put United on notice of classwide liability to any other than *discharged* former flight attendants.¹⁸ The prejudice to United in expanding an originally claimed class of approximately 30 into a potential class of over 1,000 ten years after it has abandoned the policy upon which the suit was originally based is overwhelming. How will it defend against a claim by a flight attendant who resigned in contemplation of marriage prior to November, 1968 that she resigned because of the no-marriage policy rather than because she intended to cease work upon marriage?

The named plaintiffs recognized the inherent proof problems 7 years ago when they limited the asserted class to resigned flight attendants who had protested the no-marriage policy so as

18. In *United Air Lines v. Evans*, 431 U. S. 553 (1977), this Court held that the claim of a United flight attendant who resigned in February, 1968 because of the no-marriage policy was time-barred because she had not filed a claim with the EEOC within 90 days of her resignation. Ms. Evans could now argue that despite this Court's decision, her claim is now viable because she is within the expanded class. Ms. Evans litigated her claim through the Seventh Circuit and no doubt was aware of the concurrent *Romasanta* litigation. The fact that she never claimed to be a member of the *Romasanta* class demonstrates the perception of resigned flight attendants that they were not part of the class.

to give "assurance that the persons included within the class resigned . . . because of defendant's policy rather than for any other reason."¹⁹ *Supra*, pp. 16-17.

Respondent McDonald, who pursued the appeal in their stead, must accept the case as they framed it and as they could have appealed it. This is the representation she made to this Court in 1977 when she convinced the Court her intervention would not prejudice United.

The decision of the Court below in now directing the trial court to enlarge the class to include a group never requested by the original named plaintiffs violates basic procedural principles and this Court's tolling rule in *American Pipe*, undermines the premise upon which this Court acted when this case was first before it, and is grossly unfair and prejudicial to United.

19. The record indicates that even after the no-marriage policy was terminated, a substantial number of flight attendants resigned upon marriage or failed to return from leave of absence taken upon marriage.

CONCLUSION.

For the foregoing reasons, we respectfully request that this petition for a writ of certiorari be granted.

Respectfully submitted,

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April 1979.

APPENDIX.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

CAROLE ANDERSON ROMASANTA,
et al.,
Plaintiffs,
vs.
UNITED AIR LINES, INC., a corpora-
tion,
Defendant.
LIANE BUIX McDONALD, on her own
behalf and on behalf of others sim-
ilarly situated,
Petitioner.

No. 70 C 1157

ORDER.

This cause comes before the court upon defendant's motion to reconsider this court's order of January 11, 1978, entered pursuant to the mandate of the Court of Appeals for the Seventh Circuit in *Romasanta v. United Air Lines, Inc.*, 537 F. 2d 915 (7th Cir. 1976), *aff'd sub nom. United Air Lines, Inc. v. McDonald*, 97 S. Ct. 2464 (1977). The court having read and considered said motion and the memoranda of the respective parties, and the court having heard arguments by counsel and being fully briefed in the premises,

IT IS ORDERED:

1. This court's Order of January 11, 1978 be and it is hereby vacated.

2. Petitioner Liane Buix McDonald is hereby permitted to intervene as a party plaintiff on her own behalf and on behalf of her class, which is hereby defined as a class composed of all women who were employed by defendant United Air Lines, Inc. as stewardesses or flight attendants and who, because of said defendant's no-marriage policy, were discharged between July 2, 1965 and November 7, 1968.

3. This action shall proceed henceforth, and shall be maintained, as a class action pursuant to Rule 23(b), Federal Rules of Civil Procedure, on behalf of the afore-said class, with plaintiff Liane Buix McDonald to serve as class representative, and Thomas R. Meites and Lynn Sara Frackman to serve as attorneys for the class.

4. The parties shall forthwith endeavor to agree upon a proposed notice,—including a questionnaire to be completed and submitted by those persons claiming to be class members, and a form to be completed and submitted by those persons who desire to be excluded from the class,—said proposed notice to be submitted to the court on or before March 10, 1978.

5. This cause is set for a status hearing on March 15, 1978 at 9:30 A.M.

ENTER:

/s/ J. S. PERRY,
Judge

Dated: March 1, 1978

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 78-1699

LIANE BUIX McDONALD

Plaintiff-Appellant,

v.

UNITED AIR LINES, INC.,

Defendant-Appellee.

No. 78-2035

LIANE BUIX McDONALD

Plaintiff-Appellee,

v.

UNITED AIR LINES, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

No. 70 C 1157—Joseph Sam Perry, *Judge.*

Argued September 26, 1978—Decided November 21, 1978

Before CUMMINGS, *Circuit Judge*, WISDOM, *Senior Circuit Judge*,* and SPRECHER, *Circuit Judge.*

CUMMINGS, *Circuit Judge.* These consolidated interlocutory appeals raise two questions regarding the proper definition of

* The Honorable John Minor Wisdom, Senior Circuit Judge of the United States Court of Appeals for the Fifth Circuit, is sitting by designation.

the class of stewardesses entitled to relief for the loss of their employment with defendant airline because of its prior no-marriage rule. The rule was invalidated under Section 703(e)(1) of Title VII of the Civil Rights Act of 1964 (42 U. S. C. § 2000e-2(a)(1)) in *Sprogis v. United Airlines, Inc.*, 444 F. 2d 1194 (7th Cir. 1971), certiorari denied, 414 U. S. 991.

While some married stewardesses were terminated by the defendant, others resigned involuntarily because of the no-marriage rule. See *United Air Lines v. Evans*, 431 U. S. 553, 554. The plaintiff now argues that the scope of the class as defined by the district court is too narrow, whereas the defendant approves the scope of the class as certified but argues that the statute of limitations bars relief for many or all of the class members. We have accepted both questions on interlocutory appeal pursuant to 28 U. S. C. § 1292(b).

Scope of Class

Subsequent to *Sprogis*, which had proceeded as an individual action, Carole Romasanta brought the present case as a class action, but the district court struck the class allegations.¹ The *Romasanta* plaintiffs sought an interlocutory appeal of this denial of class certification, but this Court refused to accept the appeal. After judgment, the prevailing plaintiffs refused to appeal the denial of class status, which had then become appealable. Thereafter we permitted Liane McDonald to intervene to prosecute an appeal from the adverse class determination and reversed the denial of class relief. *Romasanta v. United Airlines, Inc.*, 537 F. 2d 915 (7th Cir. 1975), *affirmed sub nom. United Airlines v. McDonald*, 432 U. S. 385.²

1. Prior to refusing to certify a class in *Romasanta*, the district court had denied the plaintiffs' motions to consolidate *Sprogis* and *Romasanta*.

2. In *McDonald*, the Supreme Court agreed with us that Mrs. McDonald's motion to intervene was timely and should have been granted by the district court. No other question was before the high court.

On remand, the district court determined on January 11, 1978, that the class would consist of all women who were employed by United as stewardesses and who resigned or were terminated because of United's no-marriage policy between July 2, 1965, the effective date of Title VII of the Civil Rights Act of 1964, and November 7, 1968, when the no-marriage rule was abolished. However, on March 1, 1978, without explanation the court vacated that class order and narrowed the class to include only those women who were discharged between those dates, thus excluding those who resigned under United's no-marriage rule in contemplation of marriage. We hold that the district court's January 11, 1978, class determination was correct and that its subsequent order narrowing the class was improper.

Apparently the district court modified the class definition in response to United's motion to reconsider the January 11 order, in which United argued for the narrower class. United's basic argument, both before the district court and here on appeal, was that the *Romasanta* plaintiffs had never before sought the broader class, and therefore Mrs. McDonald was estopped to do so now. This argument involves lengthy disputes about the relevance of and the proper interpretation of various pleadings and supporting documents in the complicated history of this case.³ In large part, the argument turns on whether the term

3. United argues that the original *Romasanta* plaintiffs had sought a class composed of all stewardesses who were "discharged by United pursuant to its no-marriage policy" and all "stewardesses who resigned from their employment upon marriage * * * and who have complained against United's no-marriage rule by filing grievances * * * or charges under Title VII * * *" (Br. 18). United contends that it had persuaded the district court, when it first denied class designation in *Romasanta*, to apply the protest requirement not merely to employees who resigned, but also to those who were terminated by United. (This resulted in a group of plaintiffs too small to proceed as a class. Hence the qualifying plaintiffs were allowed to intervene and class status was denied.) It was only this extension of the protest requirement to terminated employees, according to United, which was reversed by this Court's decision holding class

(Footnote continued on next page.)

"discharged" was used in certain of those papers as a term of art meaning any involuntary termination of employment or as the equivalent of "fired." We do not find this line of inquiry instructive. The various parties seem to have had different interpretations of the class in mind, and the scope of the class was never clarified in any of the earlier phases of the case in large part because class status was consistently denied.

Pettifogging about the prior pleadings is not decisive anyway, for the stewardesses denied relief by the district court had resigned because of the no-marriage rule and were therefore constructively discharged.⁴ *Young v. Southwestern Savings and Loan Association*, 509 F.2d 140, 144 (5th Cir. 1975). The inclusion of such persons in the class definition accords with the early motion of the *Romasanta* plaintiffs that their class include both fired and resigned stewardesses because the latter "were forced out * * * by the defendant's rule as effectively as those who were fired outright."⁵ Thereafter even United told the district court that if it were appropriate to maintain the action as a class action, the "only appropriate class would be all

(Footnote continued from preceding page.)

status appropriate in *Romasanta*. Therefore, United concludes, the class should be defined as it says the *Romasanta* plaintiffs originally proposed it.

We are unconvinced that United has properly interpreted the plaintiffs' earlier position. Moreover, as explained *infra*, United's statement to the district court in its motion to reconsider its January 11 order that the class as there defined was "contrary to the mandate of the Court of Appeals in this case, which defined the class as those 'similarly discharged' as was plaintiff *Romasanta*," misconstrues our position. Our *Romasanta* decision was not intended to be read as narrowly as United suggests.

4. The stewardesses who resigned must, as counsel for the plaintiff acknowledged at oral argument, show that their retirement was involuntary and on account of the invalid rule to be entitled to relief. Although it may be significantly easier for those who protested to make such a showing, we reiterate our *Romasanta* ruling that the fact that she did not protest will not foreclose a class member from making such a showing.

5. This motion proposed consolidation of the *Sprogis* and *Romasanta* suits, but, as noted *supra*, consolidation was denied.

former stewardesses who resigned or were terminated because of defendant's no-marriage policy" (R. 112).⁶ In truth the position of the stewardesses who resigned involuntarily cannot rightly be distinguished from the stewardesses who were fired, for United encouraged stewardesses to resign rather than await firing. *Inda v. United Airlines*, 565 F.2d 554, 557, 562 (5th Cir. 1977), certiorari denied, U. S. Indeed the district court once so recognized because it permitted Joanne Hammersly to intervene in the *Romasanta* case (R. 45) even though she had resigned in compliance with the no-marriage rule instead of waiting to be discharged.⁷ Consequently we cannot agree that the *Romasanta* plaintiffs committed themselves to limiting the class to that now urged by United.

Moreover, the district court's broad supervisory power in class actions requires it, especially in Title VII actions which attack class-based discrimination, to define the class to effectuate relief for all of its members. In *Romasanta*, we instructed the district court to fashion relief for all persons damaged by United's no-marriage rule in order to "establish equality, not only between the group discriminated against and other groups, but also among the members of the victimized group." 537 F.2d at 917, 918. Nevertheless, by its final class determination, the district court inexplicably denied relief to stewardesses who resigned to marry while according relief only to stewardesses who were discharged. Our *Romasanta* mandate was not so limited.

In holding that this class must include not only "dischargees" but also "resignees" on or before marriage, we are merely reaffirming our prior decision that relief must not discriminate

6. United simultaneously successfully proposed that the class be limited to those who had protested the no-marriage policy, but this was rejected in *Romasanta*, 537 F.2d at 919.

7. At that time, the district court included in the *Romasanta* class definition both designed and discharged stewardesses (6 FEP Cases, 156, 157), thus making it immaterial that the *Romasanta* complaint ab initio was limited to those who had been discharged.

between members of the group victimized by the no-marriage rule (537 F. 2d at 918). Apart from the illegal protest requirement (see note 6 *supra*), this is the same class definition proposed by United in November 1972, adopted by the district court in December 1972, re-proposed by Mrs. McDonald after remand in December 1977 and originally adopted by the district court in January 1978.

Period of Recovery for Class

On August 1, 1978, we granted United's petition for leave to appeal from the decision below insofar as the class order included stewardesses claiming from July 2, 1965, the effective date of Title VII of the Civil Rights Act of 1964. We agree that July 2, 1965, probably may not remain the starting date for relief.

In *Consolidated Pretrial Proceedings in the Airline Cases* (the "TWA" case), 582 F.2d 1142 (7th Cir. 1978), this Court held that the 90-day period for filing charges with the Equal Employment Opportunity Commission is jurisdictional under 42 U.S.C. § 2000e-5(d).⁸ However, as we held in *Romasanta*, "The statute of limitations in Title VII actions is suspended when one member of the class initiates the grievance mechanism." 537 F. 2d at 918 n. 6.⁹

The record (as supplemented on September 26, 1978) shows that class member plaintiffs Mary O'Connor Whitmore and Terry Baker Van Horn filed their EEOC charges on January 25,

8. The 90-day period for filing charges with the EEOC was extended to 180 days by the 1972 amendments. 42 U.S.C. § 2000e-5(e).

9. See also *Bowe v. Colgate Palmolive Co.*, 416 F.2d 711, 720 (7th Cir. 1969); *United States v. Georgia Power Co.*, 474 F.2d 906, 925 (5th Cir. 1973); *Allen v. Amalgamated Transit Union*, 554 F.2d 876, 882-883 (8th Cir. 1977). *Inda v. United Air Lines, Inc.*, 565 F.2d 554 (9th Cir. 1977), is distinguishable because it involved an attempt by two individuals who had never filed timely complaints with the EEOC or a state agency to use the filings of other individuals to establish their right to sue.

1966. Therefore, the temporal limits of this class will date from October 27, 1965 (90 days before the EEOC charges) to November 7, 1968, when the no-marriage rule was withdrawn.¹⁰ This ruling is not unfair to United, for it was put on notice by the Whitmore-Van Horn filings¹¹ that aggrieved stewardesses were challenging its no-marriage rule policy. Therefore, it is unimportant that they were intervening plaintiffs rather than original plaintiffs in the *Romasanta* suit.¹²

10. On the basis of the record before this Court, October 27, 1965, appears to be the most likely tolling date. However, discovery may reveal that an earlier date is appropriate for several reasons. First, if either the Whitmore or Van Horn complaints were "pending with the Commission" on March 24, 1972 (the date of enactment of the 1972 amendments), the new 180-day limitations period would apply. Pub. L. 92-261, § 14 (quoted in Historical Note to 42 U.S.C.A. § 2000e-5). See *Inda v. United Air Lines, Inc.*, 565 F.2d 554, 560 (9th Cir. 1977). Second, discovery might turn up a prior EEOC charge, thus resulting in a different tolling date. Third, the limitations period for filing with the EEOC is extended if the complaint has first been lodged with a state agency with EEOC-like powers. 42 U.S.C. § 2000e-5(e). Prior to the 1972 amendments, a complainant filing first with such a state agency had 210 days after the discrimination to file with the EEOC. The 1972 amendments extended this to 300 days. Apparently neither Van Horn nor Whitmore filed charges with a state agency. However, the plaintiffs have suggested that Helen Read Gunst or another member of the class may have filed with a state agency before filing with the EEOC, thus entitling her to the extended limitations period. If discovery reveals this to be the case, the tolling date would be 210 or 300 days prior to the filing of the newly-discovered complaint with the EEOC, depending on whether that complaint was still "pending with the Commission" on March 24, 1972, so that the 1972 amendments apply. It is possible, therefore, if the 210 or 300-day limitations periods apply, that the class would include all stewardesses claiming from July 2, 1965, the effective date of Title VII.

11. It is immaterial that their charges were not denominated class charges. *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239 (3d Cir. 1975), certiorari denied, 421 U.S. 1011; *Inda v. United Air Lines*, 565 F.2d 554 (9th Cir. 1977).

12. United argues that the only EEOC charges which can toll the statute are those of the named plaintiffs in the *Romasanta* class action, or at least those EEOC charges of persons who could have instituted suit on their own behalf. Since the EEOC proceedings on the Whitmore and Van Horn charges were never completed and

(Footnote continued on next page.)

A10

Reversed and remanded for further proceedings consistent herewith.

A true Copy:

Teste:

.....
*Clerk of the United States Court of
Appeals for the Seventh Circuit*

(Footnote continued from preceding page.)

right-to-sue letters never issued, these charges could not have been the basis for suit. However, United does not dispute that the reason the Whitmore and Van Horn charges were never completed was that Carole Romasanta received her right-to-sue letter first and instituted this suit as a class action. Whitmore and Van Horn were not required to go through the needless exercise of pursuing conciliation in order to intervene in the *Romasanta* suit when class status was denied in December 1972. Similarly, neither the fact that the administrative process was not completed nor the fact that Whitmore and Van Horn later settled their individual claims means that their EEOC filings cannot be preserved as the event which tolled the statute for the class of which they were members.

A11

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

January 25, 1979.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. JOHN MINOR WISDOM, Senior Circuit Judge*

Hon. ROBERT A. SPRECHER, Circuit Judge

LIANE BUIX McDONALD,
Plaintiff-Appellant,
v.

UNITED AIR LINES, INC.,
Defendant-Appellee.

Nos. 78-1699 and
78-2035

LIANE BUIX McDONALD,
Plaintiff-Appellee,
v.

UNITED AIR LINES, INC.,
Defendant-Appellant.

} Appeal from the United
States District Court
for the Northern Dis-
trict of Illinois, East-
ern Division.

No. 70 C 1157

Joseph Sam Perry,
Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by United Air Lines, Inc., no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

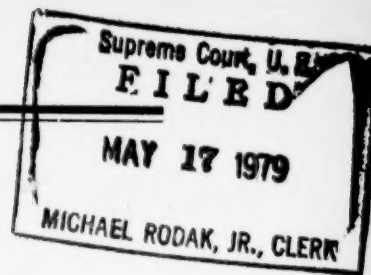
* The Honorable John Minor Wisdom, Senior Circuit Judge of the United States Court of Appeals for the Fifth Circuit, is sitting by designation.

A12

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

IT IS FURTHER ORDERED that "timely" be substituted for "any" in the third from last line of footnote 9 of the slip opinion.

No. 78-1610



**In the
Supreme Court of the United States**

OCTOBER TERM, 1978

UNITED AIR LINES, INC.,

Petitioner,

vs.

LIANE BUIX McDONALD,

Respondent.

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

THOMAS R. MEITES,
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**In the
Supreme Court of the United States**

OCTOBER TERM, 1978

No. 78-1610

UNITED AIR LINES, INC.,

Petitioner.

vs.

LIANE BUIX McDONALD,

Respondent.

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

Liane Buix McDonald, on her own behalf and on behalf of the class in this case, files the following in opposition to the petition for writ of certiorari.

OPINIONS BELOW

No opinion was issued by the district court. The unanimous opinion of the court of appeals (Pet.App. A3-A10) is reported at 587 F.2d 357.

JURISDICTION

The petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on November 21, 1978, and rehearing was denied on January 25, 1979. The petition for writ of certiorari was timely filed within 90 days thereafter, on April 20, 1979.

QUESTIONS PRESENTED

1. Should certiorari be granted to review the decision of the court of appeals about the temporal limits of the class in this employment discrimination case, when the decision below does no more than apply settled principles concerning the tolling effect for the class of EEOC charges filed by a class member co-plaintiff?

2. Did the court of appeals err in reaffirming what it had held two years before, in a decision affirmed by this Court, 432 U.S. 385 (1977), that *inter alia* the class must include all women injured by petitioner's concededly unlawful employment practice?

STATEMENT

Prior to November 7, 1968, petitioner United Air Lines required its female flight attendants, in contrast to its male flight attendants, to resign upon marriage or be discharged. This case was brought in 1970 as a class action to gain relief for those women who had been injured by this concededly unlawful employment practice under Title VII of the Civil Rights Act of 1964.¹

¹ Petitioner abandoned its affirmative defense that being unmarried is a "bona fide occupational qualification reasonably necessary to the position of stewardess," originally asserted in its answer to the complaint.

In 1972, on United's motion to strike the class action allegations of the complaint, the district court held that the prospective class in this case could only include women who had resigned or been terminated because of marriage and who had then "protested" the no-marriage rule by filing a union grievance or by filing individual discrimination charges with the Equal Employment Opportunity Commission or a comparable state agency. *Romasanta v. United Air Lines, Inc.*, 6 FEP Cases 156 (N.D. Ill. 1972). Thus defined, the class was viewed by the district court as being of insufficient numerosity to satisfy the requirement of Federal Rule of Civil Procedure 23(a). *Id.* at 159. However, it indicated it would permit intervention to all who had resigned or were terminated and who had protested. *Id.*

The original plaintiffs sought interlocutory review of the adverse class determination pursuant to 28 U.S.C. § 1292 (b), arguing that the "protest requirement" was plainly wrong and that after preliminary discovery, it appeared that the potential class of women who had lost their employment because of the no-marriage rule was far in excess of that needed to meet the numerosity requirement of Federal Rule of Civil Procedure 23. Permission to appeal, however, was denied by the court of appeals.

In accordance with the invitation to intervene extended by the district court to "all former stewardesses who resigned or who were terminated because of United's said [no-marriage] policy between July 2, 1965 and November 7, 1968, and who thereafter protested the no-marriage policy or termination," 6 FEP Cases at 157, a number of former stewardesses intervened as co-plaintiffs. Relief as appropriate was fashioned for the original and intervening plaintiffs, and a final decision was entered on October 3, 1975. However, the original and intervening plaintiffs in-

licated that they would not appeal from the final decision and bring up for review the adverse class determination. Respondent Liane Buix McDonald then sought to intervene to appeal the class order which had excluded her and other "non-protesting" women who had resigned or were terminated under the rule from a remedy for petitioner's unlawful employment practice.

The district court denied intervention as untimely, and the Seventh Circuit reversed. *Romasanta v. United Air Lines, Inc.*, 537 F.2d 915 (1976). The court of appeals held that intervention to appeal the class ruling had been timely. *Id.* at 917. Turning to the merits, the Seventh Circuit held that the district court had erred in imposing its protest requirement and that the case should have been allowed to proceed as a class action. *Id.* at 918-20.

United acquiesced in the disposition of the class issues, limiting its petition for writ of certiorari, O.T. 1976, No. 76-545, to the propriety of intervention after judgment. Certiorari was granted, and the Court affirmed the decision of the court of appeals on the timeliness of intervention after judgment. *United Air Lines, Inc. v. McDonald*, 432 U.S. 385 (1977). In the course of its decision, the Court acknowledged that "United's petition for certiorari did not seek review of the determination that its no-marriage rule violated Title VII nor did it contest the merits of the Court of Appeals' decision on the class certification issue." *Id.* at 391.

Following remand, the district court in January, 1978 ordered that the case should proceed as a class action on behalf of the same class, absent the protest requirement, as it had originally defined in 1972. See 6 FEP Cases at 157. Thus, the class as certified was to consist of all women who "resigned or were terminated" because of United's no-marriage rule after July 2, 1965 (the date Title VII

went into effect) and November 8, 1968 (the date United abandoned the rule). However, in March, 1978 on United's motion to reconsider, the district court narrowed the class to exclude women who had involuntarily resigned in anticipation of marriage as required by the no-marriage rule. Both parties sought interlocutory review of the class definition, plaintiff challenging exclusion of constructive discharges and United claiming the temporal limits of the class were overinclusive. Permission to appeal was granted as to both issues by the court of appeals pursuant to 28 U.S.C. § 1292(b).

On appeal, the Seventh Circuit rejected United's attempt to distinguish between women who had been discharged because of the no-marriage rule and women whose resignations had been required by the express terms of the rule. 587 F.2d at 357, 360 (1978); Pet. App. A7-8. In this, the court stated (*Id.* at 360) that it was doing no more than reaffirm what it had decided two years previously in *Romasanta v. United Air Lines, Inc.*, 537 F.2d 915, the decision affirmed by this Court. 432 U.S. 385. On United's cross-appeal, the court of appeals accepted United's argument that it had not waived objections to the temporal limits of the class, rejected plaintiff's argument that the dates set by the district court in 1972 were res judicata, and held that the starting point of the class would be determined by the filing of the first EEOC charge by any of the class member plaintiffs. 584 F.2d at 361; Pet. App. A.8. United's petition for rehearing and a suggestion that the cause be reheard en banc were denied without opinion and without a vote.

REASONS FOR DENYING THE WRIT

The class definition, as has finally emerged after almost a decade of litigation, does not involve any issue worthy of this Court's attention. The claimed conflict among the circuits is illusory, and the decision of the court of appeals in this case is fully in consonance with prior decisions of this Court and other circuits. Also, the petition is presented on the basis of a misleading factual presentation, which should not be accepted as a basis for granting review.

I.

There is no merit to petitioner's argument (Pet. 8-15) that there is a conflict among the circuits on the question of whether the temporal limits of a class in a Title VII action are to be determined by the date of the filing of the first EEOC charge filed by a class member plaintiff. Here, that EEOC charge (filed by two intervening plaintiffs) was still pending at the time suit was filed and could have resulted in issuance of another "right to sue" letter and the filing of another class action in lieu of participation by intervention. Contrary to the petition (Pet. 9-10) respondent did not argue nor did the court below find that the statute was tolled by "*any* person" who had filed. (Italics in original.) Instead, respondent argued and the court below found the statute tolled by the EEOC filings of two co-plaintiffs, women who joined the suit while their timely EEOC charges were still pending. As petitioner appears to recognize (Pet. 9), if these two women—Terry Baker Van Horn and Mary Whitmore O'Connor—had not intervened in this action but instead had awaited the completion of EEOC proceedings and brought a second class action

following issuance of a "right to sue" letter, the starting date of the class would be 180 days before their charges had been filed, or July 29, 1965. Rather than await the conclusion of duplicative EEOC proceedings and initiation of duplicative litigation, those women intervened in this action at the invitation of the district court. 6 FEP Cases at 158. As the court of appeals correctly recognized (587 F.2d at 360, n.12, Pet. App. A.9), the starting date for the class can be no different with these women as co-plaintiffs than if they had filed their own class action. This unexceptional conclusion is based squarely on the principle settled by *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1974), and recognized by this Court in its prior opinion in this case, 432 U.S. at 389 n. 6, that the filing of a charge by a class member plaintiff satisfies the filing requirement for the class, a point petitioner conceded below and does not contest here.

United's claim of prejudice from this result is disingenuous. For example, when Terry Baker Van Horn filed her EEOC charge in January, 1966 she also filed a union grievance complaining about her termination because of the "no-marriage" rule. While the EEOC charge was held in abeyance, the union grievance was treated by United as a "test case" for the validity of the no-marriage rule. See *In re Van Horn*, 48 Lab. Arb. 727 (1967). There was no reason for United to believe that Ms. Van Horn would lose interest in her challenge under Title VII to the "no-marriage rule" after the arbitrator had declined to reach that issue, 48 Lab. Arb. at 733. (Of course she did not abandon the Title VII claim but rather became a co-plaintiff in this action.)

Neither *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239 (3rd Cir. 1975), *Inda v. United Air Lines, Inc.*, 565 F.2d

554 (9th Cir. 1975),² nor the numerous district court cases cited by petitioner (Pet. 12) involve the question raised by petitioner and at issue below. On the contrary, these cases merely recite the settled rule which limits participation in class actions to absent class members who could still have timely filed themselves when the tolling charge was actually filed. This is precisely what the Seventh Circuit held here. Thus, after identifying the Van Horn and O'Connor charges as the tolling event it provisionally limited the class to those terminated within ninety days of their filing. 587 F.2d at 361 n.10; Pet. App. A.9.³

² The court of appeals properly distinguished *Inda v. United Air Lines, supra*. In that case, United had made a convincing case that the EEOC filings of the two plaintiffs were untimely and therefore defective. To overcome this potential defect in their individual cases, the plaintiffs in *Inda* sought to rely on EEOC charges which had resulted in other litigation to establish their right to sue under Title VII. This the Ninth Circuit refused to allow. 565 F.2d at 558. In this case, however, it is undisputed that the two original co-plaintiffs, Romasanta and Altman, had gone through the entire EEOC procedure and that the suit satisfied all of the jurisdictional prerequisites of Title VII. The Seventh Circuit therefore distinguished *Inda* as a case in which the sole plaintiffs sought to establish their right to sue on the basis of EEOC charges which had already resulted in litigation brought by others in another forum. 587 F.2d at 361 n.9; Pet. App. A.8 n.9.

³ If the petition for writ of certiorari should be granted, however, respondent would argue that petitioner has long ago waived any right to complain of the temporal limits set by the district court in 1972, i.e., July 2, 1965 to November 8, 1968, and not thereafter challenged. The court of appeals rejected this contention on the ground that the time limits of Title VII are jurisdictional and may not be waived. 587 F.2d at 360-61; Pet. App. A.8-9. Respondent has not cross-petitioned from this portion of the decision of the court of appeals because such review would be premature in light of the provisional nature of the ruling of the court below, 587 F.2d at 361 n.10; Pet. App. A.9, n.10. She would, of course, raise this as an alternate ground for affirmance, however, if the instant petition is granted.

II.

Petitioner would also have the Court review the direction of the court below that the relief should be provided to all similarly situated women injured by the policy, a result that is consistent with the policies of Title VII and the history of this case to date. Petitioner repeats arguments that the court of appeals aptly described as "pettifogging about the prior pleadings," 584 F.2d at 359, Pet. App. A.6, in arguing here that the class should not include constructive discharges, i.e., women who involuntarily resigned because of marriage as required by the "no-marriage rule," but should be limited to women who were discharged after refusing to comply with the rule and resign. (Pet. 15-20.) (The "no-marriage rule" prohibited the retention of a stewardess on marriage.) As shown in Part III below, this argument is based on a seriously misleading recitation of a 10-year long record. On the actual facts of the case, the court below was clearly correct in concluding that there was no basis for distinguishing between women who incurred the identical injury proscribed by Title VII—the loss of employment by females but not males—whether these women had involuntarily resigned or were fired. 587 F.2d at 360; Pet. App. A.6.

In holding it error to exclude from the class women who had resigned involuntarily, the court of appeals found United's semantic arguments to be without significance. 587 F.2d at 359-60; Pet. App. A.7. As the court noted, at various times the different parties to this matter have had various interpretations of the class in mind. Also, the scope of the class was never clarified in any of the earlier phases in large part because class status was consistently denied. In fact, after conducting its own review of the lengthy record of this case, the court below found that contrary to United's arguments (raised again in its petition

in this Court, Pet. at 16-17), the inclusion of constructive discharges in the class comported not only with the early notions of the *Romasanta* plaintiffs, but was also consistent with United's position in the district court. It acknowledged in the district court that a "class, if appropriate, would include all former stewardesses who resigned or were terminated," 584 F.2d at 360, Pet. App. A.6-7. It was also consistent with United's own policy of encouraging stewardesses to resign rather than await firing. *Id.* The class mandated by the court of appeals is, in fact, exactly the same class adopted by the district court at United's suggestion in 1972 absent the illegal protest requirement. 584 F.2d 360; Pet. App. A.8.

Indeed, this identity of situation appears to have been acknowledged in related proceedings in this court. In its decision in *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 554 (1977), this Court described the no-marriage rule as having the effect of forcing the resignation of a stewardess who married. It is too late in the day for petitioner to retract its characterization in *Evans* of a resignation compelled by the unlawful rule as having been "involuntary,"⁴ or to argue that involuntary resignees were not injured by the rule. Thus, as the court of appeals correctly concluded, the parties' own view of the case was consistent with the district court's duty to include involuntary resignees and so fashion a class coincident with those who were damaged. 584 F.2d at 360; Pet. App. A.8.

For at least seven years, petitioner has had notice of the fact that the class of women injured by the no-marriage rule who had not "protested" their loss of employment was far in excess of the 27 or 28 persons referred to in the

⁴ Brief of Petitioner, *United Air Lines, Inc. v. Evans*, O.T. 1976 No. 76-333, at 4.

original complaint. Given the representations of the original plaintiffs in the district court and in their unsuccessful petition for permission to appeal about numerosity, there is no room in this case for United to argue that it will be unfairly prejudiced if it is required to make whole all of the women who were injured by its unlawful no-marriage rule.

The decision below turns on the idiosyncrasies of a ten-year long record and raises no legal questions of unique or pressing importance. The court below itself acknowledged that it was doing nothing more than reaffirm what it had decided two years before (in the decision previously affirmed by this Court). Review of the decision below remanding relief for all who were injured by the no-marriage rule would not seem to involve any questions worthy of the Court's attention.

III.

The factual presentation which permeates the petition for writ of certiorari is so contrary to what occurred during the ten years of this litigation that respondent is obliged to review the record lest the Court consider granting review on a state of facts which does not exist. The theme which underlies the petition for writ of certiorari is that the original plaintiffs did not seek to represent all persons who had been injured by the "no-marriage rule," i.e., that the original plaintiffs only sought to represent women who had been fired or involuntarily resigned and who had "protested" the no-marriage rule. (Pet. 10, 17, 19, 20). This is plainly contrary to the record in this matter.

First (contra, Pet. 17), the original plaintiffs plainly sought to represent all women who had lost their employment because of the no-marriage rule. As the original plaintiffs stated in their objections to defendant's pro-

posed order striking class actions, filed in the district court on September 12, 1972:

"It may be that in certain cases of resignation, in contrast to formal discharge, evidence that an individual protested her job termination may be relevant to prove that she was terminated involuntarily. However, once it is shown that an individual's employment was *involuntarily* termination because of the no-marriage rule, that individual should be deemed an eligible member of the class entitled to relief in this action whether or not she made a protest." (emphasis in original)

This is flatly at odds with petitioner's representation (Pet. 17) that "the named plaintiffs never asked the trial court to include in the class those flight attendants who had resigned without protest."

Second (contra, Pet. 16), it is more than "slightly misleading," 432 U.S. at 385 n.14, for petitioner to represent that the original plaintiffs proposed the two subclasses set out in the petition at 4 and 16. These two subclasses were proposed in another case, *Sprogis v. United Air Lines*, on remand from 444 F.2d 1194 (7th Cir. 1971), in an attempt to have that case converted into a class action. That the source of the two sub-classes is another case—is made clear in the petition for permission to appeal (Appendix, No. 76-545, at 62-73), which is incompletely quoted in the Petition for Writ of Certiorari at 4 and 16.⁵

⁵ Thus, the introduction to the subclass definition omitted from the material quoted by petitioner (Pet. at 4, 16) as "evidence" of original plaintiffs' position in this case—states that the submission was made in *Sprogis* after the Seventh Circuit's remand in that case, when "the Plaintiff in *Sprogis*, on February 5, 1972, filed a memorandum on the scope of the class entitled to relief." Pet. for Per. to Appeal, reprinted in App. No. 76-545 at 63. This memorandum was submitted by *Sprogis* in support of her motion for class treatment for this class. The motion was denied. *Sprogis v. United Air Lines*, 56 F.R.D. 420 (N.D. Ill. 1972).

Third, (contra, Pet. 17), petitioner misrepresents what was "confirmed in a statement of record" by counsel for the original plaintiffs. Rather than disavowing representation of stewardesses who had resigned (Pet. at 17), counsel for the original plaintiffs stated that he had sought relief for "stewardesses who resigned against their will because of marriage" as in another portion of the "statement of record" (actually a letter) selectively quoted by petitioner (Pet. at 17).

CONCLUSION

It is respectfully submitted that certiorari should be denied.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1978.

No. 78-1610

UNITED AIR LINES, INC.,

Petitioner,

vs.

LIANE BUIX McDONALD,

Respondent.

**PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI.**

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I.

The Tolling Event.

A. In response to the first question raised in the Petition, respondent denies that the Court of Appeals held that the filing of a similar charge with the EEOC by any person, and not only by the named class plaintiff, would be the event which commences a class action. Opp. Br. 6. Although the Court of Appeals looked to the filing by two specifically named persons who had intervened on their own behalf after class status denial, the Court added: "However, discovery may reveal that an earlier date is appropriate. . . . [D]iscovery might turn up a prior EEOC charge, thus resulting in a different tolling date." The

Court suggested as a possibility the charge which may have been filed by a person whose claim had been brought and settled before the New York State Division of Human Rights. Pet., App. A9 n. 10; 587 F. 2d 357, 361 n. 10; Pet. 14.

B. Respondent also argues that there is no conflict between the decision below and the many cases cited in the Petition to the effect that the tolling event is the filing of the EEOC charge by the named class plaintiff (Pet. 10-12). She claims that these cases "merely recite the settled rule which limits participation in class actions to absent class members who could still have timely filed themselves when the tolling charge was actually filed." This is precisely what the Seventh Circuit held, claims respondent, when it limited the class to those terminated within 90 days of the Whitmore and O'Connor charges (neither a named class plaintiff), which charges it had found to be the tolling charges. Opp. Br. 8.

This is a non sequitur. The issue is what is the tolling event, not what consequences flow from the event. The cases cited in the Petition state unequivocally that it is the filing of the charge by the named class plaintiff which is the tolling event—not that filed by a putative, unnamed, potential class member. "But Wetzel and Ross [the named class plaintiffs] cannot represent those who could not have filed a charge with the EEOC at the time they filed their charges." *Wetzel v. Liberty Mutual Insurance Co.*, 508 F. 2d 239, 246 (3d Cir. 1975), *cert. denied* 421 U. S. 1011. (1975).

Respondent supports the efforts of the Court below to distinguish the Ninth Circuit's decision in *Inda v. United Air Lines*, 565 F. 2d 554 (9th Cir. 1977), another class action arising out of United's former no-marriage policy. Opp. Br. 8 n. 2. The Court of Appeals here distinguished *Inda* on the ground that it "involved an attempt by two individuals who had never filed timely complaints with the EEOC or a state agency to use the filing of other individuals to establish their right to sue." Pet. App. A8 n. 9; 587 F. 2d at 361 n. 9. However, the named

plaintiffs Inda and Moritz had in fact filed their own charges and their suit was permitted to stand. They attempted to rely on the earlier Sprogis and Romasanta EEOC charges as the tolling event to expand the time frame of the putative class to 90 days before the filing of the earlier charges. This the Ninth Circuit refused to allow: "We conclude that the 90 day statute was not tolled by the filing of charges by other than Inda and Moritz [the named plaintiffs]." 565 F. 2d at 559. The conflict is clear.

II.

The Scope of the Class.

With respect to the second question presented in the Petition—whether the class to be certified on remand after this Court's earlier decision in this case could include a subclass not requested by the named plaintiffs—respondent apparently does not deny the proposition that as intervenor she must take the case as framed by the original plaintiffs. The vice in our position, she contends, is that we misrepresented what the named plaintiffs had requested.

A. Respondent concedes that the two subclasses as described in our Petition were requested in the *Sprogis* case. See Pet. 4. But, respondent claims, it is "more than 'slightly misleading'" for us to represent that these were the same subclasses requested in this case. Opp. Br. 12.

The fact is the same counsel represented the plaintiffs in *Sprogis* and in this case, they moved to consolidate the two on the grounds they were the same, and moved the same class be certified in the consolidated case. This course of action and the class sought are described in the original plaintiffs' Petition for Permission to Appeal the class status denial in 1972. This document is set out in full in the Appendix to the first *McDonald* case in this Court, No. 76-545, App. 62-72.

Respondent suggests, in effect, that when the named plaintiffs sought to consolidate the *Sprogis* and *Romasanta* cases, they

had in mind one class for *Sprogis* and another for *Romasanta*. The proposition is absurd on its face and simply was not what was sought. To belabor the obvious, we include as Appendix A to this Reply the proposed Order of consolidation and class certification submitted by the original named plaintiffs in 1972. The subclass relating to stewardesses who resigned is limited to those "who have complained against United's no-marriage rule by filing grievances under a collective bargaining agreement between United and the Air Line Pilots Association or by filing charges under Title VII or under other federal or state laws, regulations, or executive orders banning discrimination in employment because of sex." *Infra*, A2.

B. Respondent quotes two sentences from a memorandum filed by the original named plaintiffs to support her argument that a different class was indeed requested in this case from that proposed in *Sprogis*. Opp. Br. 12. The quotation does not support the conclusion that such a class was being proposed. To the contrary, the very document upon which respondent relies states at the outset that this suit "was framed as a class action to secure relief for the class of Stewardesses similarly situated with the Plaintiff in *Sprogis v. United Air Lines* . . ." *Infra*, A4. The memorandum then sets out again the two subclasses precisely as we have described them. Since intervenor has conceded in her Opposition Brief that the class sought in *Sprogis* did not include a subclass of stewardesses who resigned without protest, the statement by the original named plaintiffs of the purpose of this suit should end any possible dispute about the class sought in this case. Again, to remove any question of precisely what the named plaintiffs stated in that memorandum, we set out in Appendix B to this Reply the first three pages of that document wherein the plaintiffs state the identity of the classes in *Sprogis* and this case. *Infra*, A4.

C. In an effort to buttress her contention that this case always involved the broad class she sought after remand, respondent describes her motion to intervene after dismissal of

the suit in 1975: "Respondent . . . then sought to intervene to appeal the class order which had excluded her and other 'non-protesting' women who had resigned or were terminated under the rule from a remedy for petitioner's unlawful employment practice." Opp. Br. 4. What respondent described as her purpose in intervening in 1975 is not quite what she now states. Her Petition to Intervene is set out in full in the Appendix in No. 76-545 at pages 93-5. In that Petition the suit is described as one brought on a class basis on behalf of former stewardesses "who were discharged by United." Respondent described herself as one "discharged by United." Her intervention petition claimed that the district court's order denying class action status "excluded from this action all persons who had been discharged." Finally, her petition stated she sought to appeal the trial court's ruling "regarding the exclusion of petitioner and all persons similarly situated." There is not a single reference, implicit or explicit, in the Petition to Intervene to persons who resigned.*

D. Respondent refers to this Court's decision in *Evans v. United Air Lines*, 431 U.S. 553 (1977), and observes that "It is too late in the day for petitioner to retract its characterization in *Evans* of a resignation compelled by the unlawful rule as having been 'involuntary,' or to argue that involuntary resignees were not injured by the rule." Opp. Br. 10.

Evans arose on United's motion to dismiss on jurisdictional grounds, and therefore *Evans*' allegation that she was forced to submit her resignation and that this was a violation of Title VII had to be accepted as true. This was no concession by United that resignations unaccompanied by protests were in violation of Title VII. But more to the point, *Evans* is irrelevant to what class the plaintiffs sought to represent in this case. Whether a proper class action could be brought on behalf of

* By the time respondent sought to intervene in 1975, the claims of those who had resigned and protested had been fully settled. Pet. 17.

stewardesses who resigned because of the no-marriage policy absent a protest of that policy is beside the point. That is not the class which the named plaintiffs requested here.

E. Respondent states that the class directed to be certified by the Court of Appeals—*i.e.*, all former stewardesses whether resigned or discharged—is consistent with United's position in the district court. Opp. Br. 10. Respondent comes to this by quoting part of a sentence from one of United's briefs in the district court, but omitting that part of the sentence which limits the suggested class to those who resigned *and* who protested—precisely the position taken by the named class plaintiffs. See Pet. 17 n. 15.

Respondent has made this assertion repeatedly since this case was remanded by this Court, and each time we have pointed out the error. It is disappointing to see this inaccuracy repeated by respondent in her Brief in Opposition. Yet respondent charges us with "a misleading factual presentation" (Opp. Br. 6), "a seriously misleading recitation" (Opp. Br. 9), "a factual presentation . . . contrary to what occurred" (Opp. Br. 11), and "misrepresent[ation]" (Opp. Br. 13). The temptation is great to respond more fully to respondent's intemperate attacks. But this is at bottom a diversion from the issues raised in our Petition.

F. Respondent notes that in its decision holding that the class to be certified must include a subclass of stewardesses who resigned without protest, the Court below stated that it was doing no more than reaffirm what it had decided two years previously when this case was first before it *sub nom. Romasanta v. United Air Lines*, 537 F. 2d 915 (7th Cir. 1976). Opp. Br. 5. Although the Court of Appeals now says that it was reaffirming what it said in its first opinion, the fact is the earlier opinion contains not a single reference to stewardesses who resigned. To the contrary, the suit was described in that opinion as one on behalf of "other United stewardesses who were similarly discharged." 537 F. 2d at 917.

Indeed, in its first opinion the Court of Appeals set out the size of the class in such a way as to make clear that it was explicitly excluding resignees. It defined the class as including Ms. McDonald and "140 other stewardesses." (*Id.*) The Court explained that it had derived this figure from McDonald's statement in her brief that the district court had excluded her and 140 others similarly situated from the class and from the EEOC's statement in its brief that "United fired as many as 160 women pursuant to its no-marriage policy. . . . [A]pproximately 1828 United stewardesses resigned because of marriage".* Thus, the Court's own definition of the class as including 140 discharged stewardesses and its exclusion of the 1828 resignees shows beyond question that the Court below in its prior decision assumed the class included only flight attendants who had been discharged.

The record is clear that the original named plaintiffs limited their subclass relating to stewardesses who resigned to those who protested. This was not an inadvertence or an oversight. They meant not to include other resigned stewardesses and explained their reason:

The limitation of Class II plaintiffs to those who have protested the defendant's illegal policy by the filing of some type of grievance or charge gives further assurance that the person included within the class resigned against their will because of defendant's policy rather than for any other reason. (See Pet. 16-17.)

* The ultimate source of these figures is a computer printout provided by United which lists stewardesses who were discharged for any reason and who resigned for any reason between 1965 and November, 1968. United argued that the 140 figure was too high because it included stewardesses who had been discharged for all reasons, not just marriage, and that 30 was a more accurate estimate of the size of the class. The class claimed in the complaint was "approximately twenty-seven or twenty-eight."

Respondent offers no answer to this clear statement by the original named plaintiffs. It was error for the Court to require the certification of a class including a subclass not requested and specifically disclaimed by the original named plaintiffs.

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May 1979.

APPENDIX A.

UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

MARY BURKE SPROGIS,	} <i>Plaintiff,</i>	Civil Action No. 68 C 2311
vs.		
UNITED AIR LINES, INC.,	} <i>Defendant.</i>	

CAROLE ANDERSON ROMASANTA and BRENDA BAILES ALTMAN, on behalf of themselves and all others similarly situated,	} <i>Plaintiffs,</i>	Civil Action No. 70 C 1157
vs.		
UNITED AIR LINES, INC.,	} <i>Defendant.</i>	

ORDER

The Court has read and considered the Motion of Plaintiffs to consolidate Causes and the Memoranda of the parties setting forth their positions with respect thereto. The Court has also read and considered the extensive briefs and documents filed by the parties on the issue of whether the relief afforded in the *Sprogis* case should be extended to encompass other stewardesses similarly situated and, if so, the identity of the groups or classes (Original Plaintiff's Proposed Consolidation and Class Order, filed June 1, 1972.)

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which should be eligible for such relief. The Court has also had the benefit of the oral arguments of counsel.

The Court is of the opinion that the Plaintiffs' Motion for Consolidation should be granted. The Court is further of the opinion that the relief afforded in the *Sprogis* case should be made available to other stewardesses as proposed by Plaintiff *Sprogis*.

IT IS THEREFORE ORDERED:

A. Civil Action No. 68 C 2311, *Sprogis v. United Air Lines, Inc.*, and Civil Action No. 70 C 1157, *Romasanta et al. v. United Air Lines, Inc.*, be, and they hereby are, consolidated.

B. The relief afforded in the *Sprogis* case be, and it hereby is, made available to the following groups:

I. All persons employed by United Air Lines, Inc. as Stewardesses who were discharged by United pursuant to its no-marriage policy between the dates of July 2, 1965 and November 7, 1968; and

II. All persons employed by United Air Lines, Inc., as stewardesses who resigned from their employment upon their marriage between July 2, 1965 and November 7, 1968, as required by United's no-marriage policy, and who have complained against United's no-marriage rule by filing grievances under a collective bargaining agreement between United and the Air Line Pilots Association or by filing charges under Title VII or under other federal or state laws, regulations, or executive orders banning discrimination in employment because of sex.

C. This cause is set down for a further pre-trial conference on at o'clock, for the purpose of discussing and determining the further proceedings necessary for an orderly disposition of the issues herein, including possible discovery, Master's Hearings, etc. The parties may present any

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motions they consider proper with respect to discovery at that time.

Enter:

.....
J. S. PERRY, J.

Dated:

APPENDIX B.

UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

CAROLE ANDERSON ROMASANTA and BRENDA BAILES ALTMAN,	} Plaintiffs,	Civil Action No. 70 C 1157
vs.		
UNITED AIR LINES, INC., a corporation,	} Defendant.	

PLAINTIFFS' OBJECTIONS TO DEFENDANT'S
PROPOSED ORDER STRIKING CLASS
ACTION ALLEGATIONS

Preliminary Statement

The complaint in this case was filed on May 15, 1970. The action was framed as a class action, to secure relief for the class of Stewardesses similarly situated with the Plaintiff in *Sprogis v. United Air Lines, Inc.* (Civ. No. 68 C 2311), which case had not been pleaded initially as a class action. At the time the complaint in the present case was filed, this Court had granted the Plaintiff's motion for summary judgment in the *Sprogis* case (January 21, 1970), and Defendant United Air Lines had filed a petition for leave to appeal to the Court of Appeals.

On September 25, 1970, while the Defendant's appeal to the Seventh Circuit Court of Appeals was pending, this Court

(Filed November 10, 1972.)

entered an order placing the *Romasanta* case on the passed case calendar. The Court so acted because *Sprogis* and *Romasanta* presented similar issues. The Court of Appeals entered its order affirming this Court's ruling in *Sprogis* on June 16, 1971, and United thereafter filed a Petition for Certiorari in the United States Supreme Court. On September 28, 1971, this Court's ruling in *Sprogis* having been affirmed, the Plaintiffs filed a motion asking that the Court set a hearing to determine the scope of the class in *Romasanta*. On October 18, 1971, this Court continued the Plaintiffs' motion and ordered that the case be returned to the passed case calendar. On December 14, 1971, the Supreme Court denied the Defendant's Petition for a Writ of Certiorari in *Sprogis*.

Upon the remand of *Sprogis* to this Court by the Court of Appeals, the Plaintiff in *Sprogis*, on February 15, 1972, filed a memorandum on the scope of the class entitled to relief, urging that in the *Sprogis* case the Court enter an order determining that the relief afforded the individual plaintiff in that case should be made available to the following two groups of persons, that question having been left open in this Court's decree of January 21, 1970:

CLASS I:

All persons employed by United Air Lines, Inc. as stewardesses who were discharged by United pursuant to its no-marriage policy between the dates of July 2, 1965 and November 7, 1968.

CLASS II:

All persons employed by United Air Lines, Inc., as stewardesses who resigned from their employment upon their marriage between July 12, 1965 and November 7, 1968 as required by United's no-marriage policy, and who complained against United's no-marriage rule by filing grievances under a collective bargaining agreement be-

tween United and the Air Line Pilots Association, or by filing charges under Title VII of the 1964 Act or under other state or federal laws, regulations, or executive orders banning discrimination in employment because of sex.

The Plaintiffs in both cases also moved to consolidate *Sprogis* and *Romasanta*. On June 14, 1972, this Court entered its order continuing *Sprogis* as an individual action only and denying the motion to consolidate. The Court stated as a reason for declining to broaden the *Sprogis* case that to convert *Sprogis* to what amounted to a class action, after the merits had been decided (notwithstanding the reservation in the original order of the possibility of doing so), would be to sanction one-way intervention, a step which the Court deemed to be unjust. The Court then stated, "The views of the court set forth herein are in no way prejudicial to the eventual disposition of the *Romasanta* case on its merits."